

***United States Court of Appeals  
for the Second Circuit***



**APPELLANT'S  
BRIEF**





UNITED STATES COURT OF APPEALS  
SECOND CIRCUIT

**76-6031**

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WALTER WOE ( a pseudonym), by his  
mother and guardian, WILMA WOE (a  
pseudonym), on behalf of themselves  
and all others similarly situated,

Appellants-Plaintiffs,

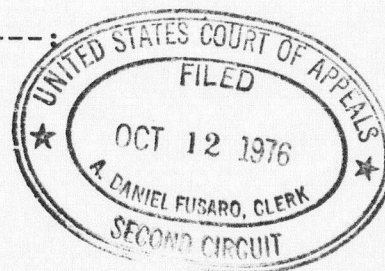
- v. -

DOCKET NO. 76-6031

DAVID MATHEWS, individually and as  
Secretary of the United States Department  
of Health, Education and Welfare; HUGH  
L. CAREY, individually and as Governor  
of the State of New York; LAWRENCE  
L. KOLB, M.D., individually and as  
Commissioner of Department of Mental  
Hygiene of the State of New York;  
MORTON B. WALLACH, M.D., individually  
and as Director of Brooklyn State  
Hospital; and, THE STATE OF NEW YORK,

Appellees-Defendants.

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BRIEF FOR APPELLANTS



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## TABLE OF CONTENTS

Preliminary Statement	<u>Page</u> 1
Statement of Issues	8
Statement of The Case	9
<u>Prima facie</u> proof of the two-tier discrimina- tions as to the place, the method of, and the quality of short-term mental hospital care	9
I. Two-tier discriminations as to the place of hospitalization.	9
A. The black are steered to the state mental institution	10
1. The utilization rates of public over non-public mental hospitals are 3:1 among whites; however, they are 14:1 among blacks, a difference of more than 450%.	11
2. Opinions of the experts	11
B. The poor are steered to the state mental institution	11
C. The less educated are steered to the state mental institution	13



II. Two-tier discriminations as to the method of hospitalization	14
III. Two-tier discriminations as to quality of care	16
A. Unjust discriminations as to cost	16
B. Unjust discriminations as to quality and quantity of staff	18
<u>Prima facie</u> proof to correct certain misap- prehensions concerning state mental insti- tution inmates	20
I. The lengths of stay are similar in state mental institutions and in general hospitals	21
II. The numbers of patients treated in both facilities are equal - 700,000 annually	22
III. Medicaid pays for the majority of the socially advantaged general hospital patients while excluding similarly afflicted poorer state mental institu- tion inmates	23

The individual patient, the late Walter Woe 26

Argument 34

I. The inmates' motion for leave to amend their amended complaint should have been granted to allow them to join as individual and class defendants those who are primarily responsible for the de facto discrimination against the socially disadvantaged as to the place and method of short-term mental hospitalization. 34

II. The inmates' motion for leave to amend their amended complaint should have been granted to allow them to join as additional defendants those who share primary responsibility for the de facto discrimination against the socially disadvantaged as to the quality of short-term mental hospital care - the Joint Commission on Accreditation of Hospitals and its officers. 42



III. Class certification for the involun- tarily civilly committed inmates of state mental institutions should not have excluded those inmates under 21 and over 65 years of age	47
IV. The New York Legislature's appro- priation bills for short-term mental hospital care, and the New York Mental Hygiene Laws regulating the place of, the method of, and the quality of short-term mental hospitalization are invidious, as applied, to involuntarily civilly committed inmates of New York state mental institutions	50
A. Inequitable state appropriations	50
B. Unfair New York Mental Hygiene Laws	52
C. Discussion	55
V. The federal Medicaid exclusion of otherwise eligible Medicaid beneficiaries solely because they are state mental institution inmates invidiously, as applied, discriminates against those	

socially disadvantaged who require  
short-term mental hospital care 59

Conflicting comparisons between the  
Woe Amended Complaint and the Legion  
Amended Complaint 62

A. General allegations in the Legion  
Amended Complaint versus specific  
allegations in the Woe Amended  
Complaint 63

B. The individuals and the class in  
Legion were long-term inmates, and  
the relief requested was improved  
long-term custodial care. Woe  
and his class were short-term  
inmates and the relief requested  
was adequate short-term care. 64

C. The Woe Amended Complaint contained  
prima facie proof in the form of  
detailed specific allegations that  
Woe, as an individual, was dis-  
criminated against solely because  
he was socially disadvantaged.  
Legion did not. 66



D. The Woe Amended Complaint contained prima facie proof in the form of detailed specific allegations that the class constituting of involuntarily civilly committed state mental institution inmates were discriminated against solely because they were : socially disadvantaged. Legion did not. 67

Conclusion 70

APPENDICES TO APPELLANTS' BRIEF

- A. Index on Appeal
- B. Amended Complaint in Woe, et al. v. Mathews, et al., U.S.D.C., E.D.N.Y., Civ. No. 75 C 1029
- C. District Court' Memorandum and Order in Woe v. Mathews, ibid., 408 F. Supp. 419 (1976)
- D. Amended Complaint in Legion v. Richardson, 354 F. Supp. 456 (S.D.N.Y. 1973).



- E. Motion of November 17, 1975, inter alia,  
to join as individual and class defendants,  
New York Supreme Court Justices, etc.
- F. Motion of December 8, 1975 to join as  
defendants, Joint Commission on  
Accreditation of Hospitals, etc.

# TABLE OF CITATIONS

## CASES

<u>Birnbaum v. Trussel</u> , 347 F.2d 86, 89 (CCA 2d, 1965)	Page 63
<u>Kletschka v. Driver</u> , 411 F.2d 436 (CCA 2d, 1969)	37
<u>Legion v. Richardson</u> , 354 F. Supp. 456 (S.D.N.Y. 1973); <u>aff'd sub nom., Legion v. Weinberger</u> , 414 U.S. 1058 (1973); rehearing denied, 415 U.S. 939 (1974).	60, 61
<u>McRedmond v. Wilson</u> , 533 F.2d 757 (CCA 2d, 1976)	57, 58
<u>Solesbee v. Balkom</u> , 339 U.S. 9, 16 (1950), (dissenting opinion, Frankfurter, J.)	51
<u>Snowden v. Hughes</u> , 321 U.S. 1 (1944)	63
<u>Woe v. Mathews</u> , 408 F. Supp. 419 (E.D.N.Y. 1976)	7,57,59

## STATUTES

United States Constitution, Fifth Amend.	45
Fourteenth Amend.	45
Medicaid statute, Title XIX, Social Security Act of 1935, as amended, 42 U.S.C. §1396d(a)	60
New York Mental Hygiene Law, Article 13	52, <u>et seq.</u>
Article 13.17	53, <u>et seq.</u>
Article 13. 19	53. <u>et seq.</u>
Article 31	56
Article 35	56



Rule 15, F.R.C.P.	36
Rule 23, F.R.C.P.	48

MISCELLANEOUS SOURCES

Joint Information Service of the American Psychiatric Association and the National Association for Mental Health, Psychiatric Treatment in the Community (1974)	23
Kramer, M., Rosen, B.M., & Willis, E.M., <u>Definitions and Distributions of Mental Disorders in a Racist Society</u> , in WILLIE, C.V., KRAMER, B.M., & BROWN, B.S., RACISM AND MENTAL HEALTH, 353, 355-56 (1973)	12
Letter of July 17, 1975 to Morton Birnbaum, M.D. from the Office of Controller, Downstate Medical Center	17,22
Letter of March 12, 1976 to Morton Birnbaum from Morton Posner	40,41
Mental Health Information Service, First Appellate Division of the Supreme Court of the State of New York, Annual Report for the Fiscal Year 1973-74	14
New York Daily News, May 12, 1976	48,49
New York Times, January 22, 1973	24

Psychiatric News, February 6, 1976	45
Torrey, E.F. & Taylor, R.L., Cheap Labor from Poor Nations, 130 Am. J. Psychiatry 428 (1973)	19
National Institute of Mental Health, Private Mental Hospitals 1969-70, Mental Health Statistics Series A, No. 10, at 11	19
National Institute of Mental Health, Utilization of Mental Health Facilities 1971	11
National Institute of Mental Health, Biometry Branch, Statistical Note No. 47	13
Statistical Note No. 74	21
Statistical Note No. 104	13
Statistical Note No. 105	14
Statistical Note No. 106	16



PERTINENT PARTS OF CHALLENGED MEDICAID STATUTE

42 U.S.C. § 1396d(a) provides in pertinent part:

"(a) The term 'medical assistance' means payment of part or all of the cost of the following care and services . . . for individuals . . . who are--

"(1) under the age of 21,

★ ★ ★ ★ ★

"(iii) 65 years of age or older,

★ ★ ★ ★ ★

"(v) . . . permanently and totally disabled . . .  
"but whose income and resources are insufficient to meet all of such cost--

"(1) inpatient hospital services  
(other than services in an institution for  
. . . mental diseases);

★ ★ ★ ★ ★

"(4)(A) skilled nursing facility services  
(other than services in an institution  
for . . . mental diseases) ; . . .

★ ★ ★ ★ ★

"(15) intermediate care facilities  
(other than such services in an institution  
for . . . mental diseases);

★ ★ ★ ★ ★

"(16) . . . inpatient psychiatric  
hospital services for individuals under  
age 21 . . .

★ ★ ★ ★ ★

"except as otherwise provided in paragraph (16), such term does not include--

"(A) any such payments with respect to care or services for any individual who is an inmate of a public institution (except as a patient in a medical institution); or

"(B) any such payments with respect to care or services for any individual who has not attained 65 years of age and who is a patient in an institution for . . . mental diseases."



PERTINENT PARTS OF CHALLENGED NEW YORK MENTAL HYGIENE LAW

ARTICLE 13. Regulation and Quality Control of Services  
for the Mentally Disabled

Section 13.17 Formal hearings; procedure

(a) When a hearing must be afforded pursuant to this chapter. . . . .

(b) The commissioner, acting as hearing officer, or any person designated by him as hearing officer shall have power to:

1. administer oaths and affirmations,
2. issue subpoenas, which shall be regulated by the civil practice law and rules.
3. take testimony.
4. control the conduct of the hearing.

. . . . .

(g) The commissioner shall issue a ruling within ten days after the termination of the hearing . . . . .

Section 13.19 Confinement, care and treatment of the  
mentally ill.

(a) No individual who is or appears to be mentally disabled shall be detained, deprived of his liberty, or otherwise confined without lawful authority, or inadequately, unskillfully, cruelly or unsafely cared for or supervised by any person.

(b) If the commissioner has reason to believe that this section is being violated, or that services are being provided in violation of this article, he shall promptly investigate the matter. If he finds, after

after notice to the person accused of the violation and opportunity to be heard, that there has been a violation, the commissioner shall issue an order directed to the person who has committed the violation directing him to cease and desist from the violation.

(c) The commissioner may bring the following proceedings in the supreme court, in accordance with the provisions of section 13.21:

1. for an injunction where the person to whom a cease and desist order is directed has failed to comply therewith.
- a. for a temporary restraining order where the commissioner has reason to believe that a violation of this section may result in injury to any person.

. . . . .



### PRELIMINARY STATEMENT

This is an individual and class action brought on behalf of all the involuntarily civilly committed inmates of New York state mental institutions for the mentally ill.

It is the primary goal of this lawsuit to obtain the medically needed and constitutionally required adequate short-term mental hospital care for these inmates.

\*

The Amended Complaint alleges that in this state, and throughout the nation, there are invidious discriminations between the socially advantaged and the socially disadvantaged as to the place of, as to the method of obtaining, and as to the quality of short-term mental hospital care.

De jure, under state law, and de facto, when the poor, the black and the uneducated become so severely mentally ill as to require short-term mental hospitalization, they are steered - usually by involuntary civil commitment - to

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\* The Amended Complaint is set forth in Appendix "B", and is hereinafter referred to as "AC".

the state mental institution.

By contrast, when the middle and upper classes, the white and the educated similarly become so severely mentally ill as to require short-term mental hospitalization, they are steered - invariably by voluntary hospitalization - to the general hospital psychiatric facility.

Subsequent to the utilization of these invidious two-tier procedures for short-term mental hospitalization, there follows equally, if not even more invidious two-tier provisions for short-term mental hospital care that are directly and causally related to unfair procedures for mental hospitalization. These unjust two-tier provisions for short-term mental hospital care also exist de jure, under state and federal laws, and de facto.

The poor, the black and the uneducated inmates of the state mental institutions receive only unneeded, and potentially harmful, inadequate custodial short-term care at a total cost of less than \$25.00 a day.



By contrast, the socially advantaged general hospital psychiatric facility patients receive needed, and potentially curative, adequate and active short-term care at a total cost that is at least \$250.00 a day.

Neither ability to pay nor financial sponsorship in building the general hospital psychiatric unit is a factor in steering the socially disadvantaged only to the state mental institution and then providing them only with unneeded and potentially harmful short-term care.

As to ability to pay, the socially disadvantaged because of their poverty and their severe mental illness are eligible for federal Medicaid benefits. Medicaid is ready, willing and able to pay the complete \$250.00 a day or more cost for any beneficiary who had been steered to, and treated in, the general hospital.

Furthermore, the majority of psychiatric patients in the upper-tier general hospital psychiatric facility receive Medicaid benefits. For although this majority is middle-class, they are

usually considered to be medically indigent, and therefore, eligible for Medicaid. This occurs because the usual Blue Shield and other third-party hospitalization insurance contract excludes mental hospitalization.

As to financial sponsorship of the building of the general hospital psychiatric units, almost all these facilities were built since 1960 and almost 100% with federal funds.

Admittedly, more money and better care may not always improve the prognosis and result for the poor, black and uneducated state mental institution inmate who now invariably receives only inadequate and custodial short-term care at a cost of \$25.00 a day. The inmate claims, however, that he is constitutionally entitled to at least the same opportunity for cure or failure that is invariably routinely accorded to the upper and middle class, white and educated general hospital mental patient at a cost of \$250.00 a day or more.



For relief, the plaintiffs claimed that they had a constitutional right to adequate care and treatment as they had been involuntarily civilly committed by means of loosely construed remedial substantive and procedural state mental hospitalization laws. Ostensibly, the sole reason for their involuntary incarceration was that the State of New York claimed that these inmates needed active and adequate short-term mental hospital care.

The inmates claimed, therefore, that as they had been involuntarily civilly committed, quid pro quo, they had a constitutional right to receive adequate short-term care at the mental facility to which they had been committed by a Justice of the New York Supreme Court.

The prayer for relief, however, did not limit itself to making the conventional, orthodox and expected request that the budgets of state mental institutions be increased - through increased state appropriations, through Medicaid eligibility and other federal funding, etc. - so that the state institution would be able to approach the \$250.00 a day level of expenditures of the general hospital psychiatric facility.

Realistically, at most this could only result in still invidious two-tier procedures for short-term mental hospitalization that would be subsequently followed by "separate but only theoretically equal" provisions for short-term mental hospital care.

The inmates have, therefore, made an unconventional, unorthodox and unique constitutional claim of first instance.

They claim that it is constitutionally required to have a single "integrated and equal" short-term mental hospitalization procedure for both the poor, the black and the uneducated and for the socially advantaged. Furthermore, they claim that this must constitutionally be directly related to, and subsequently followed by, a single "integrated and equal" active and adequate short-term mental hospital care system.

Thereby, both the socially advantaged and the socially disadvantaged would usually be voluntarily hospitalized, and both groups would be treated within the same adequate short-term facilities..



Plaintiffs-inmates appeal from the adverse parts of an Order entered on January 16, 1976 in the United States District Court for the Eastern District of New York by the Hon. Edward R. Neaher. The Memorandum and Order is reported as Walter Woe, et al. v. David Mathews, et al., 408 F. Supp. 419 (1976), and is set forth as Appendix "C" to this brief.

The inmates appeal from the District Court Order because if - after a lengthy, complex and groundbreaking trial prosecuted in forma pauperis by plaintiffs through unpaid counsel who spends limited personal funds for all costs and expenses of this lawsuit - the District Court were to find that the inmates' constitutional rights had been violated by invidious two-tier mental hospitalization procedures and by invidious two-tier mental hospital care provisions, the Order appealed from has so emasculated the inmates' claims for relief, that no effective remedy remains in this lawsuit by which the plaintiffs could correct these wrongs.



## STATEMENT OF ISSUES

I. SHOULD THE INMATES' MOTION FOR LEAVE TO AMEND THEIR AMENDED COMPLAINT HAVE BEEN GRANTED TO ALLOW THEM TO JOIN AS INDIVIDUAL AND CLASS DEFENDANTS THOSE WHO ARE PRIMARILY RESPONSIBLE FOR THE DE FACTO DISCRIMINATION AGAINST THE SOCIALLY DISADVANTAGED MENTALLY ILL AS TO THE PLACE OF, AS TO THE METHOD OF OBTAINING, AND AS TO THE QUALITY OF SHORT-TERM MENTAL HOSPITALIZATION ?

II. SHOULD THE INMATES' MOTION FOR LEAVE TO AMEND THEIR AMENDED COMPLAINT HAVE BEEN GRANTED TO ALLOW THEM TO JOIN AS ADDITIONAL DEFENDANTS THOSE WHO SHARE PRIMARY RESPONSIBILITY FOR THE DE FACTO DISCRIMINATION AGAINST THE SOCIALLY DISADVANTAGED AS TO THE QUALITY OF SHORT-TERM MENTAL HOSPITAL CARE - THE JOINT COMMISSION OF ACCREDITATION OF HOSPITALS AND ITS OFFICES ?

III. SHOULD CLASS CERTIFICATION FOR THE INVOLUNTARILY CIVILLY COMMITTED INMATES OF STATE MENTAL INSTITUTIONS HAVE EXCLUDED THOSE INMATES UNDER 21 AND OVER 65 YEARS OF AGE ?

IV. ARE THE NEW YORK LEGISLATURE'S APPROPRIATION BILLS FOR SHORT-TERM MENTAL HOSPITAL CARE, AND THE NEW YORK MENTAL HYGIENE LAWS REGULATING THE PLACE OF, THE METHOD OF OBTAINING, AND THE QUALITY OF SHORT-TERM MENTAL HOSPITALIZATION INVIDIOUS, AS APPLIED, TO INVOLUNTARILY CIVILLY COMMITTED INMATES OF STATE MENTAL INSTITUTIONS ?

V. IS THE FEDERAL MEDICAID EXCLUSION OF OTHERWISE ELIGIBLE BENEFICIARIES SOLELY BECAUSE THEY ARE STATE MENTAL INSTITUTION INMATES INVIDIOUS, AS APPLIED, IN THAT IT DISCRIMINATES AGAINST THOSE SOCIALLY DISADVANTAGED WHO REQUIRE SHORT-TERM MENTAL HOSPITAL CARE ?



## STATEMENT OF THE CASE

### PRIMA FACIE PROOF OF THE TWO-TIER DISCRIMINATIONS AS TO THE PLACE, THE METHOD AND THE QUALITY OF SHORT-TERM MENTAL HOSPITAL CARE

In anticipation of the defendants' motions to dismiss, the Amended Complaint sets forth, in detail, allegations supporting the claims of unjust situations in mental hospital care. These allegations are supported by specific citations in the Amended Complaint to government reports, expert opinions, etc.

The following data briefly abstracts some of the more important data in the Amended Complaint supporting the allegations of invidious discrimination depending upon whether one is socially advantaged or disadvantaged as to the place, the method and the quality of short-term mental hospital care.

#### I. TWO-TIER DISCRIMINATIONS AS TO THE PLACE OF HOSPITALIZATION

The basic claim is that (A) The black  
(B) The poor, and (C) The uneducated are invidiously  
steered to the state mental institution.

A.           THE BLACK ARE STEERED TO THE STATE MENTAL  
              INSTITUTION

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There are far higher admission and resident patient rates of blacks than of whites in state mental institutions.

There is no study, however, that even claims, much less proves, that there is an increased incidence or prevalence of severe mental illnesses among blacks to cause these higher utilization rates of state facilities. These differences in utilization rates, therefore, are not a medical phenomenon.

Rather they are a socio-economic phenomenon due to the fact that for Woe and similarly disadvantaged blacks, there is no alternative to the state institution for short-term mental hospitalization.

The following data supports the above conclusions;



1. THE UTILIZATION RATES OF PUBLIC OVER NON-PUBLIC MENTAL HOSPITAL FACILITIES ARE 3:1 AMONG WHITES; HOWEVER, THEY ARE 14:1 AMONG BLACKS, A DIFFERENCE OF MORE THAN  
450%

A recently published report by the National Institute of Mental health entitled UTILIZATION OF MENTAL HEALTH FACILITIES 1971 found a difference among white males in the overall utilization rates of public versus non-public mental hospitals of 3:1.

The comparable difference in utilization rates among black males was 14:1. This is a difference in racial utilization rates of more than 450%.

These difference would have been even greater if limited to the 26 year old group to which Woe had belonged. [AC-39]

2. OPINIONS OF THE EXPERTS

The most authoritative review of racial differences in utilization rates of mental hospital facilities is by the Chief and two members of the Biometry Branch of the National Institute of Mental Health.

These scientists who constitute the nation's leading experts on mental health care epidemiology concluded the following as to the relationship of race to both the place and the quality of care:

" Racist practices undoubtedly are key factors - perhaps the most important ones - in producing mental disorders among blacks and other under-privileged groups, in determining the place where members of these groups receive diagnosis and treatment for these disorders, and in determining the quality of such clinical services . . . . In some instances, the role of racism will be obvious; in others, not so obvious."

Kramer, M., Rosen, B.M., & Willis, E.M.,  
Definitions and Distributions of Mental Disorders in a Racist Society, in WILLIE, C.V., KRAMER, B.M., & BROWN, B.S.  
RACISM AND MENTAL HEALTH, 353, 355-56  
(1973) (Emphasis added.) [AC 40-41]

The foregoing data presents prima facie proof of the invidious racist discrimination as to the place, as to the method and as to the quality of mental hospital care.

Further condemnation of this practice of de facto racist steering to the state mental institution can be found in the expert opinions by every major national black health care group and by every major national black civil rights group [AC 50-53].



B.           THE POOR ARE STEERED TO THE STATE MENTAL  
              INSTITUTION

"(S)tate mental hospital . . . patients are known to be heavily concentrated at the lower socio-economic levels." ADMISSION RATES BY FAMILY INCOME LEVEL - OUTPATIENT PSYCHIATRIC SERVICES - 1969, STATISTICAL NOTE 47, BIOMETRY BRANCH, NATIONAL INSTITUTE OF MENTAL HEALTH (May, 1971), at 2. [AC-37]

C.           THE LESS EDUCATED ARE STEERED TO THE STATE  
              MENTAL INSTITUTION

"Admission rates show an inverse relationship between level of education and rate of admission; the lower the level of education, the higher the age-adjusted admission rate." ADMISSION RATES BY HIGHEST LEVEL OF EDUCATION ATTAINED - STATE AND COUNTY MENTAL HOSPITALS - 1972, STATISTICAL NOTE 104, BIOMETRY BRANCH, NATIONAL INSTITUTE OF MENTAL HEALTH (April, 1974), at 2. [AC-37]

II. TWO-TIER DISCRIMINATIONS AS TO THE METHOD  
OF HOSPITALIZATION

The following data is the prima facie proof contained in the Amended Complaint as to invidious methods of short-term mental hospitalization:

Throughout the nation, most state mental institution inmates are involuntarily civilly committed to these institutions, e.g. in 1972, only 48.6% of state mental institution admissions were voluntary. LEGAL STATUS OF INPATIENT ADMISSIONS TO STATE AND COUNTY MENTAL HOSPITALS, UNITED STATES 1972, STATISTICAL NOTE 105, DIVISION OF BIOMETRY, NATIONAL INSTITUTE OF MENTAL HEALTH (May, 1974) at 2. [AC-42]

By contrast, general hospital psychiatric admissions are generally voluntary hospitalizations as can be seen by the following data from the Annual Report of the Mental Health Information Service for the First Appellate Division of the Supreme Court of the State of New York for the Fiscal Year 1973-74. [AC-42]



LEGAL STATUS OF ADMISSION TO IN-PATIENT PSYCHIATRIC FACILITIES

<u>Name of General Hospital</u>	<u>Voluntary</u>	<u>Involuntary</u>
Mount Sinai Hospital	881	0
New York Hospital	733	0
University Hospital	307	0
Roosevelt Hospital	573	0

Name of State Mental Institution

Manhattan State Hospital	1,112	2,206
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Manhattan State Hospital is the state mental hospital that serves the same geographical areas served by the above general hospitals.

III. TWO-TIER DISCRIMINATIONS AS TO QUALITY OF CARE

The Amended Complaint contained as prima-facie proof of invidious discriminations as to quality of care the following data as to: (A) Per diem costs, and (B) Quality and quantity of staffing.

A. UNJUST DISCRIMINATIONS AS TO COST [AC-32-3]

In 1973, the average daily expenditure per patient in a state mental institution was \$25.20. This included not only room and board, but also all physicians' services, all laboratory services, all medications, all social services, etc.

In New York, the average cost was only \$24.03, or below the national average.

PROVISIONAL PATIENT MOVEMENT AND ADMINISTRATIVE DATA - STATE AND COUNTY MENTAL HOSPITAL IN-PATIENT SERVICES, JULY 1, 1972-JUNE 30, 1972, STATISTICAL NOTE 106, DIVISION OF BIOMETRY, NATIONAL INSTITUTE OF MENTAL HEALTH (May, 1974), at 10.

By contrast, the average daily cost per patient for active psychiatric care in a general hospital is at least 10 times the cost of inadequate care in a state mental institution.



For example, at Downstate Medical Center, the average cost per psychiatric in-patient during 1974 was \$307.01 a day - not including the cost of physician's and other professional staff services. Letter of July 17, 1975 to Morton Birnbaum, M.D. from the Office of Controller, Downstate Medical Center.

The cost of services of a psychiatrist, psychologist, etc. usually runs upwards from a minimum of \$50.00 a day; therefore, the total cost per day for psychiatric care at this general hospital is more than \$350.00 a day. Accordingly, the \$250.00 per diem figure used throughout this Amended Complaint is actually lower than the actual cost.

Throughout the nation, in no other area of hospital care, e.g. medicine, surgery, pediatrics, obstetrics, etc., is there any significant difference in the same community between the cost of public hospital care for the socially disadvantaged and non-public hospital care for the socially advantaged.

The District Court in its opinion did not even mention, much less take judicial notice as it should that New York state mental institution care is as a matter of law inadequate. State mental institution care at a \$25.00 a day level is as a matter of law grossly inadequate both by common law and constitutional law standards of adequacy when compared with the more than \$250.00 level of care in the general hospital.

This is especially true when as here, Brooklyn State Hospital and Downstate Medical Center are located in, and theoretically serve, the same community and treat the exact same illnesses - and are even physically adjacent.

B. UNJUST DISCRIMINATION AS TO QUALITY  
AND QUANTITY OF PROFESSIONAL STAFF [AC-36]

The state mental institutions have less than the equivalent of 11 full-time psychiatrists per 1,000 inmates, or a ratio of 1 psychiatrist to 91 inmates. By contrast, the general hospitals have the equivalent of 63 full-time psychiatrists per 1,000 psychiatric patients, or a ratio of 1 psychiatrist to 15 patients.



PRIVATE MENTAL HOSPITALS 1969-1970, Mental Health Statistics Series A, No. 10, NATIONAL INSTITUTE OF MENTAL HEALTH (1972) at 11.

As to quality, state institution psychiatrists are almost invariably foreign trained, and are usually licensed by the state to work only in these facilities. By contrast, general hospital psychiatrists are almost invariably American trained, and have unlimited state licensure.

For example, Brooklyn State Hospital had 93% foreign-trained physicians when recently compared with Downstate that had only 16% foreign trained physicians.

Torrey, E.F. & Taylor, R.L., Cheap Labor from Poor Nations, 130 Am. J. Psychiatry 428 (1973). Dr. Torrey is a staff member of the National Institute of Mental Health.

PRIMA FACIE PROOF TO CORRECT COMMON MIS-  
APPREHENSIONS CONCERNING STATE MENTAL  
INSTITUTION INMATES

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In further anticipation of the defendants' motions to dismiss, the Amended Complaint did not only set forth data as to the invidious discrimination between the socially advantaged and disadvantaged as to the places, methods and quality and quantity of mental hospital care.

The Amended Complaint also set forth data to correct certain common misapprehensions concerning state mental institution inmates that have been used to justify these unfair discriminations.

The following data briefly abstracts some of the more important data in the Amended Complaint that was prima facie proof that:

- I. The lengths of stay are similar in state mental institutions and in general hospitals;
- II. The numbers of patients treated in both facilities is similar - about 700,000 annually; and,



III Medicaid pays for the majority of the socially advantaged general hospital psychiatric patients while simultaneously excluding similarly afflicted state mental institution inmates.

I. THE LENGTHS OF STAY ARE SIMILAR  
IN STATE MENTAL INSTITUTIONS AND  
IN GENERAL HOSPITALS [AC-38]

The average period of institutionalization in state mental institutions for both short-term and long term inmates during 1971 was only 41 days.

LENGTH OF STAY TO STATE AND COUNTY MENTAL HOSPITALS,  
UNITED STATES 1971, STATISTICAL NOTE 74 (February, 1973).

Even this period might be shortened if these inmates were to receive adequate care. More important, they would be discharged far healthier than at present.

By contrast, the average stay in general hospital psychiatric facilities that only provide short-term care is only slightly less. The average stay for a Downstate Medical Center psychiatric patients is 31 days.

Letter of July 17, 1975 to Morton Birnbaum, M.D.  
from Office of Controller, Downstate Medical Center.

Of course, after this equally long period of active care, the socially advantaged are able to function better upon discharge, and are less likely to have to return to the hospital.

II. THE NUMBERS OF PATIENTS TREATED  
IN BOTH FACILITIES ARE EQUAL -  
700,000 ANNUALLY

In 1965, when Medicaid was first enacted, there were approximately 700,000 Americans from the lower socio-economic class treated annually in the inferior lower-tier state mental institution. These inmates invariably received custodial care.

In 1975, there still are the same number of inmates from the lower socio-economic class receiving inadequate custodial care.

By contrast, in 1965 when Medicaid was first enacted, there were less than 200,000 Americans from the middle and upper socio-economic classes treated annually



in separate and unequal and superior upper-tier general hospital psychiatric facilities. These patients invariably received adequate care.

In 1975, there are approximately 700,000 patients from the middle and upper socio-economic classes treated annually in these facilities, all of whom receive adequate care.

PSYCHIATRIC TREATMENT IN THE COMMUNITY, JOINT INFORMATION SERVICE OF THE AMERICAN PSYCHIATRIC ASSOCIATION AND THE NATIONAL ASSOCIATION FOR MENTAL HEALTH (1974) [AC - 34]

III. MEDICAID PAYS FOR THE MAJORITY OF THE SOCIALLY ADVANTAGED GENERAL HOSPITAL PATIENTS WHILE EXCLUDING SIMILARLY AFFLICTED POORER STATE MENTAL INSTITUTION INMATES [AC - 35]

As most of the middle-class general hospital psychiatric patients do not have the personal resources to pay directly for their care, and as most of these patients have inadequate Blue Shield or other third-party coverage, it is usual for them to be declared

medically indigent and have Medicaid pay their hospital bill.

In 1975, about \$1 billion went for the care of these middle-class general hospital psychiatric patients but not one cent went for similarly afflicted state mental institution inmates between the ages of 21 and 65. (Ibid.)

For example, in New York City, approximately 85% of Medicaid recipients are financially indigent, i.e. welfare recipients, and only 15% are medically, but not financially, indigent; however, as persons usually become medically indigent only when faced with large hospital bills not covered by third-party insurance plans, (e.g. the middle-class general hospital psychiatric patient), these 15% account for almost 50% of New York City's Medicaid expenditures.

New York Times, January 22, 1973, at p. 35, col. 7.

Medicaid, therefore, has operated only to provide more and better general hospital psychiatric care for middle class Americans. In addition, it



has actually harmed state mental institution inmates as their facilities are being increasingly deprived of desperately needed professionals who are increasingly leaving the undermanned, and overcrowded state mental institution system to work in the higher paying and less demanding upper-tier general hospital facilities.

The inmates concede that the federal government was not constitutionally obligated in 1965 to pay for short-term in-patient psychiatric care. Once, however, it began to fund active care for the socially advantaged in general hospitals, the federal government is constitutionally obligated to fund active short-term care care for the poor, the black and the uneducated involuntarily civilly committed in state mental institutions.

THE INDIVIDUAL PLAINTIFF, THE LATE WALTER WOE

Walter Woe, a pseudonym, was a 26 year old, poor, black and uneducated severely mentally ill resident of the Bedford-Stuyvesant area of Brooklyn, New York - one of the most impoverished socio-economic "ghetto" areas of New York City.

For non-emergency short-term mental hospital care, this geographical or catchment area is served primarily by two completely different mental hospital facilities, Downstate Medical Center and Brooklyn State Hospital.

Downstate Medical Center is a general hospital with a large in-patient psychiatric facility with superior staff and elaborate physical facilities. Although it is located in the center of a mental hospital catchment area that theoretically serves a population that is overwhelmingly black, both the patients and staff in this psychiatric facility are more than 90% white. Invariably, these patients are also less sick, wealthier and better educated than the inmates of Brooklyn State Hospital.



All the patients at Downstate are voluntarily hospitalized upon the referral or steering of a physician. No patient is involuntarily civilly committed to Downstate by a judge.

The majority of psychiatric patients at Downstate receive Medicaid benefits. For although this majority is middle-class, they are usually considered to be medically indigent because they are unable to pay the more than \$250.00 a day cost of the needed active and adequate short-term care that all patients receive in this facility.

Woe had never been hospitalized, nor even considered for hospitalization for active short-term care at Downstate. He claimed that solely because he was socially disadvantaged, he was, de facto, steered only to Brooklyn State Hospital, and away from Downstate.

From May, 1975 through June, 1975 when this lawsuit was initiated, Woe had been an involuntarily civilly committed inmate at Brooklyn State Hospital, a New York state mental institution for the mentally ill. He had been involuntarily institutionalized solely because the state claimed that for his own benefit, and for the benefit of others, he required adequate short-term care in a mental hospital.

Woe was diagnosed as a schizophrenic personality. He had never even been accused of, much less convicted of, the commission of any crime.

Brooklyn State Hospital is a New York state mental institution for the mentally ill that is located directly across the street from Downstate Medical Center. Typically for a state mental institution, it is understaffed, overcrowded, and has inferior physical facilities. As it is located in the center of a geographical area that is overwhelmingly black, it is not unexpected to find that both its staff and inmates are overwhelmingly black.

The inmates are more numerous, sicker, poorer and less educated than the patients at Downstate. Most of them, as was Woe, are involuntarily institutionalized; however, the adequate short-term care needed by these inmates - and for which ostensibly they were involuntarily incarcerated - is denied to them as the state provides them only with inadequate custodial short-term care at a total cost of \$25.00 a day or less.



This is less than 1/10th the cost of the routinely provided care at Downstate.

Since 1970, when he first required short-term mental hospital care, Woe had been involuntarily institutionalized on at least 13 occasions. He had never been steered, had never been hospitalized or even considered for hospitalization at Downstate for adequate short-term treatment. Solely because he was poor, black and uneducated, on each occasion he was steered de facto only to the inferior facilities of a state mental institution, Brooklyn State Hospital, to invariably receive only unneeded inadequate and custodial short-term care rather than needed adequate and active short-term care.

On no occasion was Woe voluntarily hospitalized upon the referral or recommendation or steering of a private physician as is routine for the socially advantaged. On each occasion, he was involuntarily institutionalized.

Living in Bedford-Stuyvesant, and being poor, black and uneducated, Woe had no access to any private psychiatrist who could have referred or

steered him to Downstate or an alternative superior facility for voluntary hospitalization. At most, he had access only to public institution psychiatrists who repeatedly steered him only to a state mental institution, Brooklyn State Hospital.

Because Woe rationally and properly refused to accept the unneeded and potentially harmful inadequate and custodial short-term care at the state mental institution, he was involuntarily institutionalized and compelled to submit to this inadequate and custodial short-term care.

Woe further claimed that it was not only doctors who, de facto, steered him only to the state mental institution. He claimed that solely because he was poor, black and uneducated, when he rationally refused involuntary institutionalization to the state mental institution, a New York Supreme Court Justice theoretically interpreting and enforcing loosely construed and remedial substantive and procedural New York Mental Hygiene Law, de facto, committed him only to the state mental institution.



De jure, the Justice could have committed or steered him to Downstate. De facto, however, solely because he was poor, black and uneducated, he was repeatedly involuntarily institutionalized by Justices of the New York Supreme Court only to the state mental institution.

Woe emphasized that ability to pay was not a factor in steering him de facto only to the state mental institution. Woe was eligible for Medicaid prior to his institutionalization because of his poverty and severe mental illness. Medicaid would pay, without any hesitation, the \$250.00 a day cost of the needed active and adequate short-term care at Downstate if Woe had been steered to this facility.

Furthermore, the majority of psychiatric patients at Downstate receive Medicaid benefits. For although this majority is middle-class, they are usually considered to be medically indigent because they are unable to pay the more than \$250.00 a day cost of the adequate short-term care that all patients receive in this facility.

In conclusion, therefore, Woe claimed that he was severely mentally ill and required adequate short-term mental hospital care in July, 1976.

On July 30, 1976, Woe died at Brooklyn State Hospital. His death was not due to natural causes, and his death was made a Medical Examiner's case. The results of the autopsy and other aspects of the investigation into the cause of his death are still pending according to the responses of the staff of Brooklyn State Hospital to his family's repeated inquiries. He was admitted July 28, 1976, 2 days before..

Solely because he was poor, black and uneducated, he was invidiously steered by our society, and in particular - through involuntary commitment - by our judges and doctors, both de facto and de jure, only to the state mental institution. Here he received only unneeded, potentially harmful, inadequate and custodial short-term care at a level of \$25.00 a day or less. Here he died.

Solely because he was socially disadvantaged, he was steered away from the general hospital psychiatric facility located across the street from the state mental institution. At Downstate, he



would have received the needed adequate care at a \$250.00 a day level. There, he would have lived.

Post mortem, therefore, Woe claims that if his constitutional right to adequate care and treatment had been recognized and enforced by any State or Federal judge, and if he had been steered only to an adequate short-term facility, he would, now be alive.

## ARGUMENT

I. THE INMATES' MOTION FOR LEAVE TO AMEND THEIR AMENDED COMPLAINT SHOULD HAVE BEEN GRANTED TO ALLOW THEM TO JOIN AS INDIVIDUAL AND CLASS DEFENDANTS THOSE WHO ARE PRIMARILY RESPONSIBLE FOR THE DE FACTO DISCRIMINATION AGAINST THE SOCIALLY DISADVANTAGED AS TO THE PLACE AND METHOD OF SHORT-TERM MENTAL HOSPITALIZATION.

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The First Claim for Relief was that there are unjust de facto discriminations between the socially advantaged and disadvantaged as to the place, method and quality of short-term mental hospitalization.

The involuntarily civilly committed inmates of state mental institutions for the mentally ill claimed that solely because they were socially disadvantaged, when they required short-term mental hospital care, they were de facto steered only to the inferior state mental institutions - by involuntary civil commitment - and that in these facilities, they invariably received inadequate care.

The District Court held that this Claim could not be summarily decided, required an evidentiary hearing, and, therefore, denied the defendants' motion to dismiss.



The Court, however, then went on to deny inmates' motion pursuant to Rule 15, F.R.C.P. for leave to amend their Amended Complaint to join as individual and class defendants those government officials and private individuals who were primarily responsible for the de facto steering of the socially disadvantaged to the inferior state mental facility.

(This Motion of November 17, 1975 should have been numbered No. 29 on the Docket Sheet and the Index on Appeal. It is included in the Docket Sheet entry of November 19, 1975, and is set forth in Appendix "E".)

The proposed individual and class defendants were, inter alia, the following:

A. The New York Supreme Court Justices who de jure had the power to involuntarily civilly commit Woe and the other inmates to the general hospital psychiatric facility, but who de facto, solely because Woe and his class were poor, black and uneducated, steered them only to the state mental institution by involuntary incarceration.

B. The directors and staff of the Downstate Medical Center psychiatric facility and of other general hospital psychiatric units - built almost totally with government funds - who arbitrarily de facto refuse to admit the socially disadvantaged involuntarily civilly committed, even though Medicaid is ready, willing and able to pay the full \$250.00 a day cost of hospitalization; and,

C. The directors of the Mental Health Information Service of the Appellate Divisions of the New York Supreme Court who violated their statutory duty to protect the legal rights of mental hospital patients by de facto condoning the invidious discrimination against the socially disadvantaged as to the place, method and quality of short-term mental hospitalization.

Pursuant to Rule 15's mandate that "leave shall be freely given when justice so requires," the District Court should have granted the inmates' motion to amend for the following reasons:



1. The plaintiffs' moved before the defendants had answered:

2. The District Court had not decided the motions to dismiss;

3. No defendant would have been in any way unnecessarily burdened if the primary wrongdoers had been joined as additional defendants;

4. All the proposed defendants were necessary to a just resolution of the constitutional issues of first instance before the Court.

If the proposed additional defendants had been named in the Original or Amended Complaint, motions by any defendant to sever the proposed defendants would have been denied by the District Court. Kletschka v. Driver, 411 F.2d 436 (CCA 2d, 1969)

5. Walter Woe's death will only be repeated if the socially disadvantaged continue to be invidiously steered by the proposed defendants to inadequate, and potentially harmful, short-term mental hospitals.

6. A complicated, prolonged, exhaustive and expensive trial with the inmates' prevailing would only be a pyrrhic victory if the proposed defendants who are, in reality, the primary wrongdoers, were not subject to the District Court's injunction; and,

7. Financial resources may not be available to prosecute a new and separate exhaustive trial against the proposed defendants.

Inmates prosecute this lawsuit in forma pauperis by unpaid counsel who pays all costs and expenses out of limited personal funds.

This is the only "right to treatment" case in this state that involves the inmates of the state mental institutions. Unless it is properly prosecuted, these inmates will have no appreciable and needed improvement in care in the foreseeable future.

The only result will be additional unnecessary deaths of more Woes.



At present, no so-called public law group, e.g. New York Civil Liberties Union, Legal Aid Society, Mental Health Law Project, Office of Economic Opportunity, etc. is ready, or willing or able to start an additional independent lawsuit, or even to participate in this lawsuit. See, Exhibit "A", infra, especially at page "A-2", paragraph 6, where Morton Posner, Executive Director of the Federation of Parents Organizations for The New York State Mental Institutions, Inc. states:

" We have approached the Mental Health Law Project, New York Civil Liberties Union, Office of Economic Opportunity, Legal Aid Society, and other public and private law firms, who likewise are unable to take these cases solely because of the tremendous financial burden of bringing separate actions."





HUMANE PRIORITIES

# FEDERATION OF PARENTS ORGANIZATIONS For The New York State Mental Institutions Inc.

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- Bronx Childrens Psych. Ctr.  
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- Northeast Nassau Psych. Ctr.  
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- Queens Child's Psych. Ctr.  
Mrs. Erma Gordon
- Rochester Psych. Ctr.  
Mr. Milton D. David
- Rockland Child's Psych. Ctr.  
Mrs. Gregory A. Foti
- Rockland Psych. Ctr.  
Mr. Irving Berkowitz
- Rome Develop. Ctr.  
Mr. Stewart O. Howe
- Sagamore Child's Psych. Ctr.  
Mr. John Behnken
- Sheridan Service Center  
Mrs. Helen McCarthy
- Suffolk Develop. Ctr.  
Mrs. Dorothy Posner
- Syracuse Develop. Ctr.  
Mr. & Mrs. Wayne Barney
- Syracuse Psychiatric Ctr.  
Mr. John J. Greshaber
- Wassaic Development Ctr.  
Mr. James J. Hanifer
- West Seneca Develop. Ctr.  
Mr. Chas. B. Mercurio
- Willoughbrook Develop. Ctr.  
Mrs. Diana McCourt

ASSOCIATED GROUPS:

- Buffalo Community M.H. Ctr.
- Community Advocates, Inc.
- Fairmount Child's Ctr.
- F.O.R.M.H. Foundation
- N.Y.C. Coalition for Comm. Health
- Rise East Concerned Parents
- Voice for the Handicapped
- Camp Venture, Inc.

A VOLUNTARY ORGANIZATION DEDICATED TO THE PATIENTS/RESIDENTS OF ALL AGES OF  
THE N.Y. STATE MENTAL INSTITUTIONS • A NON PROFIT TAX EXEMPT CORPORATION

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Service: (212) 765-7488

March 12, 1976

Morton Birnbaum, Esq.  
235 Tompkins Avenue  
Brooklyn, N.Y. 11216

Dear Dr. Birnbaum:

This letter is to officially notify you that our Board of Directors has approved the Federation of Parents Organizations for the New York State Mental Institutions, Inc. entering the case of Woe et al. v. Mathews et al, USDA:EDNY 75 Civ. 1029 (ERN), as plaintiffs.

There is additional information at our disposal which we wish to share with you and the court, to further support your original arguments.

Pilgrim Psychiatric Center (in Brentwood, L.I., New York - population 6,100) had lost its accreditation by the ACPF/JCAH, and only the massive infusion of additional state funds "provisionally" restored accreditation. However, the deficits and deficiencies, while being attended to, are still substantially the same. The levels of care, treatment, rehabilitation, safety, comfort and welfare are still quite low as compared to those available outside the State system, and as mandated by law and regulation (Conditions of Participation - H.E.W.).

Creedmoor Psychiatric Center (Queens - population 2,000) has lost its accreditation which is currently being appealed.

Kings Park Psychiatric Center, (Population 2,100) and Brooklyn Psychiatric Center, (population 1,200 - Kingsboro) are in danger of losing accreditation. Other state facilities have received only a one-year accreditation. This is indicative of the fact that substantial compliance in some facets of the standards was not indicated.

In addition to the conditions of neglect and negligence, add conditions of abuse (physical and mental) that obtain in the State facilities. Mysterious deaths and the modern miracle of mental illness, which somehow makes

EXHIBIT A-1



unnecessary optical aid, hearing aids, dentures, corrective surgery or prostheses. The lack of medical and dental care is epidemic in most of the State institutions.

The right to be given the respect of one's human dignity is perhaps the most obvious abuse that occurs. Inappropriate dress, both to the person and the environment, shoes that are worn through and ill-fitting, and much more that offends both the eye and other senses.

All of the above has been documented and can be substantiated. We strongly suggest that Judge Neaher take time from his busy schedule and personally visit some of the aforementioned institutions, and then some outside of the State system.

A good comparison would be Creedmoor, and the transitional service program run by a voluntary agency, also on the grounds of Creedmoor.

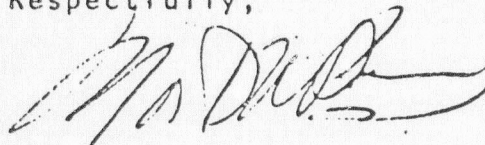
Although we represent and advocate on behalf of over 30,000 patients and their families, we are unable to afford counsel on each separate action that needs to be brought in order to remediate the inequities that still exist.

We have approached the Mental Health Law Project, New York Civil Liberties Union, Office of Economic Opportunity, Legal Aid Society and other public and private law firms, who likewise are unable to take these cases solely because of the tremendous financial burden of bringing separate actions.

In effect, by virtue of economic constraints, our constituents are being denied their day in court. Accordingly, we look to the courts to join our several actions together, with each standing on its own merits.

Please advise what other information or documentation is needed. We look forward to working closely with you on this case, and salute your valiant efforts on behalf of this vulnerable, fragile, at risk population for whom too few advocate.

Respectfully,



Morton Posner  
Executive Director

EXHIBIT "A-2"



II. THE INMATES' MOTION FOR LEAVE TO AMEND THEIR AMENDED COMPLAINT SHOULD HAVE BEEN GRANTED TO ALLOW THEM TO JOIN AS ADDITIONAL DEFENDANTS THOSE WHO SHARE PRIMARY RESPONSIBILITY FOR THE DE FACTO DISCRIMINATION AGAINST THE SOCIALLY DISADVANTAGED AS TO THE QUALITY OF SHORT-TERM MENTAL HOSPITAL CARE - THE JOINT COMMISSION ON ACCREDITATION OF HOSPITALS AND ITS OFFICERS.

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The District Court also denied plaintiffs' motion for leave to amend their Amended Complaint to join as defendants a private group that significantly supports and perpetuates the de facto discrimination against the socially disadvantaged as to the quality of short-term mental hospital care. The proposed additional defendants were the Joint Commission on Accreditation of and its officers.

(This Motion of December 8, 1975 is numbered No. 34 on the Docket Sheet and Index on Appeal.)

The Joint Commission is a private, non-governmental group established by several private non-governmental professional health care groups to assure that American hospitals give minimally adequate care to all their patients.



Upon the request of a hospital, agents of the Joint Commission inspect the hospital for a fee. If the hospital is found to be minimally adequate, it is accredited by the Joint Commission. Upon being accredited, the hospital becomes eligible for diverse benefits - both governmental and private.

For example, although this accreditation is granted by a private association of private health care groups, numerous government benefits have as a condition precedent, the requirement of such accreditation, e.g. eligibility for Medicaid, Medicare and other government third-party benefits, approval by state and local hospital licensing agencies, approval by state and local health departments, etc.

The inmates claim that the Joint Commission has established and enforced a \$25.00 a day or less standard of short-term care for accreditation of the state mental institution - all New York state mental institutions are accredited. By contrast, the Commission has established and enforced a \$250.00 a day or more standard of short-term care for the accreditation of the general hospital psychiatric facility.

The inmates claim that the \$25.00 a day level of short-term care that they receive in the state institution is, prima facie, as a matter of judicial notice, inadequate both by constitutional and common law standards when compared with the \$250.00 a day level of general hospital care.

Throughout the nation, in no other area of short-term hospital care, e.g. medicine, surgery, pediatrics, or obstetrics, is there any significant cost difference between the per diem cost of short-term care given to the socially disadvantaged in accredited public hospital facilities and the per diem cost of short-term care given to the advantaged in accredited non-public facilities.

It is only in the area of short-term mental hospital care that a per diem cost difference of at least 10 times exists between the short-term care given to the socially advantaged and disadvantaged afflicted with the same mental illness of equal severity and prognosis.

The Joint Commission, therefore, is significantly responsible for the inadequate short-term care invariably received by the state facility



inmate. It has condoned in the state mental institution what it would have condemned in the general hospital facility. See, HEW FORCED TO SURRENDER "CONFIDENTIAL" JCAH DOCUMENTS, Psychiatric News, February 6, 1976, at page 1, columns 3 and 4, annexed hereto as Exhibit "B".

The Joint Commission, therefore, has accredited state mental institutions in spite of the fact that these facilities provide only constitutionally and medically inadequate short-term care. The Commission, therefore, supports both the de facto and de jure discriminations by state and federal defendants, and by private parties whereby the state inmate receives inadequate care.

Accordingly, under the holding of Kletschka v. Driver, 411 F. 2d 436 (CCA 2d, 1969), the Joint Commission and its agents have conspired with the state and federal defendants to deprive the plaintiffs of their equal protection-due process rights under the Fifth and Fourteenth Amendments.

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# Psychiatric News

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Volume XI No. 3

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Page 1  
Cols 3 & 4

EXHIBIT "B"

P. 46

## HEW Forced To Surrender 'Confidential' JCAH Documents

Pg 1,  
cols 3-4

HEW SECRETARY DAVID MATHEWS recently turned over to the House Commerce Committee's investigations subcommittee documents on hospital accreditation that he had claimed were confidential after the subcommittee threatened to cite him for contempt, it was reported in the *Washington Post*. The subcommittee earlier had cited Interior Secretary Rogers C. B. Morton for contempt when he refused to turn over subpoenaed documents.

The documents are hospital evaluations done by the Joint Commission on Accreditation of Hospitals, which the subcommittee wants to compare with HEW's evaluations of the same hospitals. JCAH gave passing grades to 163 hospitals, entitling them to Medicare funds, but HEW surveys found enough fire safety and other deficiencies at 107 of the hospitals to disqualify them from the Medicare program, the newspaper reported. After the subcommittee staff compares the JCAH documents with HEW's

surveys, the subcommittee will decide whether to make them public, according to subcommittee chairman John E. Moss (D-Calif.), who said, "We have no desire to release material that should be accorded confidentiality, but we have no desire to withhold material merely because it could be embarrassing to someone who has been doing less than a thorough job." Moss questioned whether the role of accrediting hospitals should be delegated by federal law "to an organization which is made up of representatives of the industry—that is, the American Medical Association, the American Hospital Association, the American College of Surgeons, and the American College of Physicians."

Secretary Mathews said he agreed to turn over the documents after receiving a new ruling from Attorney General Edward H. Levi that a congressional subpoena carries more weight than any confidentiality attached to the material by virtue of the Social Security law.



III. CLASS CERTIFICATION FOR THE INVOLUNTARILY  
CIVILLY COMMITTED INMATES OF STATE MENTAL  
INSTITUTIONS SHOULD NOT HAVE  
EXCLUDED THOSE INMATES UNDER 21 AND  
OVER 65 YEARS OF AGE.

The District Court granted inmates' motion for class certification for all involuntarily civilly committed inmates of all New York state mental institutions for the mentally ill, except for those under 21 or over 65 years of age.

The reason for the District Court's exclusion probably was the fact that the federal Medicaid program reimburses the state for the care and treatment of eligible state mental institution inmates under 21 and over 65.

This group of inmates, however, also needs the protection of the federal courts as they too receive the unneeded, and potentially harmful, inadequate and custodial \$25.00 a day level of care that is invariably provided in the state mental institution.

Inmates appeal from this limitation of class certification in that it violates the spirit



and goals of Rule 23, F.R.C.P. In the future, the District Court's arbitrary dichotomy can only mean a new unjust discrimination in short-term state mental institution care - adequate for those between 21 and 65, and inadequate for those under 21 and over 65.

It must also be recalled that Woe was first involuntarily civilly committed to Brooklyn State Hospital for short-term care when he was only 20 years of age. At that time, he received only inadequate custodial care. He did not receive the needed adequate psychiatric care. The fact that he received only inadequate, and potentially harmful, care was undoubtedly a factor in causing him to require further involuntary incarcerations that eventually resulted in his death.

The conditions at New York state mental institutions for those under 21 and over 65 have been, and still are, medically and constitutionally inadequate. This has been conceded by the New York State Department of Mental Hygiene as can be seen by the annexed article entitled, "REVAMP STATE HOSPITALS FOR KIDS," New York Daily News, May 12, 1976, p. KL-7, col. 1. (Annexed hereto as Exhibit "C".)



# Revamp State Hospitals for Kids

By MICHAEL ORESKES

The state Department of Mental Hygiene announced yesterday that it was reducing the staff of the Manhattan Children's Psychiatric Center by 23 and shifting most of the positions to the Queens Children's Psychiatric Center as part of a broad reorganization of the six state hospitals for mentally disturbed youngsters.

The announcement from Albany came hot on the heels of a charge that the Queens center was extremely understaffed and that its 300 patients were being denied the comprehensive care they needed.

The charge was leveled by Dr. Gloria Faretra, director of the Queens hospital, and by the center's community advisory council.

A spokesman for the state Department of Mental Hygiene acknowledged that an "imbalance" had developed in the six state hospitals designed specifically for seriously disturbed patients under 16 years of age.

The spokesman, Robert Spoor, said that a reorganization order-

ed by Mental Hygiene Commissioner Lawrence Kolb would make staffing at the six hospitals more uniform.

The reorganization created an Office of Children and Youth Services which took control of the six hospitals from the Division of Mental Retardation, Spoor said.

"The commissioner felt there wasn't enough stress being given special needs of these facilities," Spoor said.

Under the staff changes, which will be accomplished by attrition, 23 jobs will be lopped from the 294-member staff of the Manhattan center on Wards Island and 18 positions will be

added at the Queens hospital, which now has a staff of 578.

The staff of Bronx Children's Hospital, on the grounds of the Bronx Psychiatric Center, will continue at about 242.

There are about 425 patients served by the Bronx center on an inpatient and outpatient basis, -- about 500 served at the Queens Psychiatric Center and about 150 at the Manhattan Psychiatric Center, Spoor said.

In addition, the Department of Mental Hygiene runs children's centers at Sagamore on Long Island, at the Rockland State Hospital and at West Seneca near Buffalo.

EXHIBIT "C"



IV. THE NEW YORK LEGISLATURE'S APPROPRIATION  
BILLS FOR SHORT-TERM MENTAL HOSPITAL CARE,  
AND THE NEW YORK MENTAL HYGIENE LAWS  
REGULATING THE PLACE OF, THE METHOD OF,  
AND THE QUALITY OF SHORT-TERM MENTAL  
HOSPITALIZATION ARE INVIDIOUS, AS APPLIED,  
TO INVOLUNTARILY CIVILLY COMMITTED INMATES  
OF NEW YORK STATE MENTAL INSTITUTIONS.

A. INEQUITABLE STATE APPROPRIATIONS

The New York State Legislature's annual appropriations for state supported short-term mental hospitalization are unfair.

The total state appropriation to the care of a New York state mental institution inmates is a closed-end legislative appropriation of less than \$25.00 a day. No other funds are available even if this insufficient funding necessarily results in unneeded inadequate, and potentially harmful, care.

By contrast, the state contribution to the \$250.00 or more a day cost of general hospital psychiatric patients who receive Medicaid - and most of them do - is at least \$62.50 a day. The state contribution to Medicaid is 25% of the total cost. Furthermore, this is an open ended appropriation. If the cost of this general hospitalization increases, the Legislature is automatically compelled by the state's participation in the federal Medicaid program to increase appropriations.



This is a substantial state appropriation as there are at least as many middle-class general hospital psychiatric patients on Medicaid as there are short-term state mental institution inmates.

In 1965, the state had no obligation to join the federal Medicaid program. Until then, the state paid no part of the cost of care for the middle-class general hospital psychiatric patient. The state only funded state mental institution care - both short-term and long-term.

In 1965, the state entered the federal Medicaid program, and proceeded to pay 25% of the cost of adequate care during the short-term hospitalization for the middle class. It continued to provide the socially disadvantaged only with inadequate short-term state mental institution care.

This inequity in state funding between the poor, black and uneducated state mental institution inmate and the middle class, white and educated general hospital psychiatric patient is in violation of the equal protection-due process provisions of the Fourteenth Amendment. This discrimination is not constitutional simply because it does not comport with " the deepest notions of what is fair and right and just." Solesbee v. Balkom, 339 U.S. 9, 16 (1950 ) (dissenting opinion, Frankfurter, J.)

B,

UNFAIR NEW YORK MENTAL HYGIENE LAWS

De jure, as applied, the New York Mental Hygiene Laws recognize and enforce the invidious two-tier system of short-term mental hospitalization and of short-term mental hospital care that exists, de facto, in this state. These statutes serve only to properly protect the socially advantaged while by contrast they unjustly oppress the socially disadvantaged.

First, upon requiring short-term mental hospitalization, the socially advantaged are assured of being voluntarily hospitalized while the socially disadvantaged are usually involuntarily civilly committed; therefore, it is only the socially disadvantaged who are compelled to suffer the social stigmata and legal penalties that follow involuntary commitment, e.g. loss of suffrage.

Second, as to the quality of this needed short-term care, the socially advantaged invariably receive adequate care in general hospital psychiatric facilities while the socially disadvantaged invariably receive inadequate care in the state mental institution.

Third, nowhere are our laws more unjust than when as here a remedial statute, Article 13 sets forth



methods by which an involuntarily civilly committed inmate can challenge his receiving an inadequate \$25.00 a day level of short-term custodial care.

§§ 13.17 and 13.19, inter alia, set forth descriptions of the administrative and judicial hearings available to the inmate who seeks to obtain adequate short-term care. Text of statutes set forth at p. xiii; supra.

As applied to the socially advantaged in the upper tier facility, Article 13 is constitutionally adequate but need never be applied. By contrast, for the involuntary state mental institution inmate, Article 13 is constitutionally inadequate and can never be applied.

For the upper tier facility patient, there is no question that the \$250.00 a day level of care is adequate; that being a voluntary patient, he can leave at will; and that if a hearing were to be required under Article 13, it would be one in which there is a proper separation of functions, and in which the hearing officer or the judge can order the provision of an adequate \$250.00 level of short-term care.

By contrast, for the involuntary state mental institution inmate, there is no question that the \$25.00 a day level of care is inadequate; that being an involuntary inmate, he cannot leave at will if care is inadequate; and that if a hearing were to be obtained under Article 13, it would be one in which there is no constitutionally required separation of functions, and one in which the hearing officer or judge has no power to do anything but continue to provide the inadequate \$25.00 a day level of short-term custodial care.

Article 13 is unique in our nation's laws in that it provides a hearing for the involuntarily civilly committed inmate in which there is no separation of functions, and in which there is no proper remedy.

It provides an administrative hearing under §13.17 in which the plaintiff, the defendant and the hearing officer are all one, the Commissioner of Mental Hygiene or his representative. Subsequently, it provides a New York Supreme Court hearing in which the plaintiff and defendant are all one, the Commissioner of Mental Hygiene or his representative.



Even if a finding were to be made that the \$25.00 a day level of care was inadequate, neither the hearing officer nor the Supreme Court Justice has the power to appropriate additional funds to provide the additional \$225.00 a day needed to even theoretically bring state institution care to the level of general hospital care.

C. DISCUSSION

In the First and Second Claims for Relief of the Amended Complaint, the inmates made parallel mirror-image claims. They differed only in that they claimed de facto and de jure discrimination respectively.

The inmates in both Claims for Relief alleged that solely because they were socially disadvantaged when they required short-term mental hospitalization:

1. The only place to which they were steered or committed was the state mental facility;
2. The only method used to steer them was involuntary civil commitment; and,
3. The only quality of care they received was a \$25.00 a day or less level of inadequate, and potentially harmful, care.



As to the First Claim for Relief based on de facto discrimination, the District Court held that the law of this case is:

First, that the constitutional question of first instance as to whether this discrimination between the poor, black and uneducated and the socially advantaged was done de facto is a valid claim for relief; and,

Second, that the prima facie proof of this de facto discrimination between the socially advantaged and disadvantaged contained in the Amended Complaint's detailed allegations with supporting citations required an evidentiary hearing.

In the Second Claim for Relief, the inmates proceeded to claim that this de facto discrimination between the socially advantaged and disadvantaged in short-term mental hospitalization was substantially caused by, and directly related to, relevant New York laws.

De jure, as applied, these unjust discriminations are contained in certain provisions of the New York Mental Hygiene Law relating to mental hospitalization, i.e. Articles 13, 15, 31 and 35; and, in the New York Legislature's appropriation bills for short-term mental hospital care.



In a judicial non sequitur, the District Court then proceeded to hold that this constitutional claim of first instance contained in the Second Claim for Relief was invalid.

The District Court now held that the additional law of the case was that even if this de facto discrimination existed as to the place, method and quality of short-term mental hospitalization, and even if it existed de jure as applied, the inmates' claims were unsubstantial in that precatory provisions of Article 15, N.Y. Mental Hygiene Law could be interpreted and applied to correct both the de facto and de jure wrongs, in effect, the doctrine of abstension:

" The New York Mental Hygiene Law does afford the 'right to care and treatment' for the mentally ill by explicit provision and New York Law does provide and has been employed to enforce that right. Plaintiffs have thus failed to sufficiently allege a claim for relief on the asserted grounds of the New York statute." Woe, supra, at 428.

The Woe decision was handed down on January 16, 1976. It has been, in effect, reversed by a decision of this Court handed down on February 2, 1976 in the case of McRedmond v. Wilson, 533 F.2d 757 (CCA 2d, 1976).



In McRedmond, this Court stated:

" As acknowledged at oral argument, the core of their contentions is that these schools do not comply with developing requirements of a constitutionally guaranteed 'right to treatment' for those involuntarily confined in state institutions or facilities. See, e.g. O'Connor v. Donaldson, 422 U.S. 563, 95 S.Ct 2468, 45 L. Ed. 2d 396 (1975). [at 759]

. . . .

The primary issue raised in the district court is whether plaintiffs are entitled under the United States Constitution to a minimum level of treatment and, if so, whether the treatment is being denied by the State of New York. [at 762]

. . . .

§ 1983 challenges to the constitutionality of institutional treatment of inmates, including juveniles and mental patients, are now routinely heard by federal courts (citing cases), even though as here, similar challenges might have been asserted in state forums by relying upon state due process provisions or statutes promising in general terms 'care,' 'treatment,' and the like." [at 762] (Emphasis added.)

The non sequitur decision of the District Court dismissing the Second Claim for Relief without an evidentiary hearing should be reversed in that the de facto and de jure discriminations in short-term mental hospitalization are both basically de jure discriminations against three "suspect classifications," the poor, the black and the involuntarily civilly committed.



V. THE FEDERAL MEDICAID EXCLUSION OF OTHERWISE ELIGIBLE MEDICAID BENEFICIARIES SOLELY BECAUSE THEY ARE STATE MENTAL INSTITUTION INMATES INVIDIOUSLY, AS APPLIED, DISCRIMINATES AGAINST THOSE SOCIALLY DISADVANTAGED WHO REQUIRE SHORT-TERM MENTAL HOSPITAL CARE.

---

The inmates' First Claim for Relief was that there are invidious de facto discriminations between the socially advantaged and disadvantaged as to the place, the method of receiving, and the quality of short-term mental hospitalization.

In denying the defendants' motion to dismiss, the District Court held:

" Whether the State of New York has met its constitutional obligations, whether it has treated similarly situated mental patients in an evenhanded manner, and whether it has provided adequate conditions in confinement are issues which cannot be summarily determined." Woe v. Mathews, cit. supra, at 429 (Emphasis added.)

The law of the case, therefore, is first, that a valid constitutional question was raised as to the state defendants' violation of the inmates' "right to treatment." Second, the law of the case is also that enough prima facie proof was submitted in the Amended Complaint to require an evidentiary hearing as to this claim of de facto discrimination against three "suspect classifications," the poor, the black and the involuntarily civilly committed.



In a judicial non sequitur, the District Court then proceeded to grant the federal defendants' motion to dismiss the Third Claim for Relief.

The inmates had claimed that the federal Medicaid exclusion of state mental institution inmates invidiously discriminated against them solely because they were socially disadvantaged. The District Court held that its decision to dismiss was controlled by a prior summary affirmance without a hearing or an opinion by the United States Supreme Court of a three-judge District Court decision granting a motion to dismiss. Legion v. Richardson, 354 F. Supp. 456 (S.D.N.Y. 1973); affirmed sub nom. Legion v. Weinberger, 414 U.S. 1058 (1973), rehearing denied, 415 U.S. 939 (1974). See, applicable Medicaid statute at xii, supra.

In Legion, that District Court found the Medicaid exclusion was rational because it found no prima facie proof in the general allegations of the 22 page Amended Complaint, annexed hereto as Appendix "D," of any discrimination against the socially disadvantaged. The Legion District Court further also held the exclusion rational because it only distinguished between short-term adequate care for the medically indigent general hospital psychiatric patient and long-term inadequate custodial care for the medically indigent state mental institution inmate.



" Plaintiffs . . . present no proof of . . . racially discriminatory . . . invidious discrimination.

(T)he majority opinion in Hackney, supra, has dictated that 'the standard of judicial review is not altered because of appellants' unproved allegations of racial discrimination.' 406 U.S. at 547. Here, the challenged legislation distinguishes between medically indigent persons who require short-term care and those who require long term care, and does not on its face discriminate against blacks, or poor persons. We cannot, therefore, conclude that a patently invidious discrimination evolves from this classification. " Legion, supra, at 459. (Emphasis added.)

By contrast, the Woe District Court opinion found, as the law of the case, prima facie proof of invidious de facto discrimination between the poor and black mentally ill and the socially advantaged mentally ill. It also found prima facie proof of this discrimination affecting similarly situated severely mentally ill who required short-term mental hospitalization. Woe, supra, at 428-29.

The findings of fact by the Woe District Court as to the First Claim for Relief - de facto discrimination by state defendants - cannot be ignored by the Woe District Court as to the Third Claim for Relief - de jure discrimination by the federal defendants. The law of the case for the state defendants is the law of the case for the federal defendants.



The purpose of the following discussion is to show that based upon the inadequate general allegations of the brief Legion Amended Complaint, the findings of the Legion District Court were, perhaps, proper.

Accordingly, based upon the specific detailed allegations, supported by specific citations, of the lengthy "Brandeis-type" Woe Amended Complaint, the Woe District Court should have upheld the validity of the inmate's claim that the Medicaid exclusion of short-term state mental institutional care is invidious.

The Woe District Court failed to properly distinguish the facts of the Woe case from those of Legion

The Woe Amended Complaint is set forth in Appendix "B," and is hereinafter cited as "Woe AC." The Legion Amended Complaint is set forth in Appendix "D," and will hereinafter be cited as "Legion AC."

CONFLICTING COMPARISONS BETWEEN THE WOE AC  
AND THE LEGION AC.

Except for the facts that both complaints are Amended Complaints, and that both complaints



were dismissed upon motions to dismiss, there is nothing substantially similar between these two pleadings.

A.           GENERAL ALLEGATIONS IN THE LEGION AC  
              VERSUS SPECIFIC ALLEGATIONS IN THE WOE AC.

The 23 pages of the Legion AC contained only general allegations of unjust discriminations while the 58 pages of the "Ernadeis-type" Woe AC contains only specific detailed allegations supported by specific citations from government reports, scientific publications and expert opinions.

Not one of the specific allegations in the Woe AC was contained in the Legion AC.

This Court has repeatedly held that in §§ 1983, 1985, etc. civil rights actions, the complaint "must set forth facts showing some intentional and purposeful deprivation of constitutional rights," and that the plaintiffs are "bound to do more than merely state vague and conclusionary allegations." Birnbaum v. Trussel, 347 F.2d 86, 89 (1965), citing Snowden v. Hughes, 321 U.S. 1 (1944), et al.



B. THE INDIVIDUALS AND THE CLASS IN LEGION  
WERE LONG-TERM INMATES, AND THE RELIEF  
REQUESTED WAS IMPROVED LONG-TERM  
CUSTODIAL CARE. WOE AND HIS CLASS  
WERE SHORT-TERM INMATES AND THE RELIEF  
REQUESTED WAS ADEQUATE SHORT-TERM CARE.

In Legion, all the named inmates were long-term inmates of the state mental institutions for the mentally ill and for the mentally retarded, as follows:

Legion was a 30 year old mentally ill inmate whom the Amended Complaint drawn in November, 1972 alleged had been institutionalized since February, 1972;

Hosts was a 10 year old mentally retarded inmate of Willowbrook State School who had been institutionalized since 1967; and,

Armies was a 70 year old inmate of Kings Park State Hospital who had been institutionalized for over a year.

All the named plaintiffs were long-term inmates of state institutions. Accordingly, the basic claim of Legion was that the inmates and their class were entitled to receive Medicare and Medicaid benefits to improve the inadequate long-term custodial care that they received.



Legion did not claim that the level of care for these inmates was constitutionally required to be raised to the level of adequate active care received by short-term general hospital psychiatric patients. Accordingly, Legion did not ask for the integration of state inmates with general hospital patients as did Woe.

Woe, by contrast, had only been institutionalized a short period when the Amended Complaint was drawn. Unlike Legion, Woe was specifically interested in, and specifically required, adequate short-term care. He specifically requested in the Prayer for Relief that the place, the method and the quality of hospitalization for the state inmate be equalized and integrated with general hospital psychiatric care.

In Woe, the inmates did not ask that the federal Medicaid program in any way reimburse the state for the inadequate short-term custodial care being given to them in the state institution.

The Prayer for Relief in Woe asked only that the state mental institution be constitutionally eligible for Medicaid reimbursement, but that it receive this reimbursement only if it provided the needed active short-term care that Woe and his class required.



C. THE WOE AMENDED COMPLAINT CONTAINED PRIMA  
FACIE PROOF IN THE FORM OF DETAILED SPECIFIC  
ALLEGATIONS THAT WOE, AS AN INDIVIDUAL, WAS  
DISCRIMINATED AGAINST SOLELY BECAUSE HE WAS  
SOCIALLY DISADVANTAGED. LEGION DID NOT.

The individual plaintiff, Legion, was mentioned only in passing in the Legion AC in one paragraph on page 7, and in one paragraph of page 8. There are no individual specific details that provided the necessary prima facie proof that solely because he was socially disadvantaged, he was discriminated against as to the place, method and quality of custodial care.

The Woe AC goes into exhaustive detail in a total of 9 pages to present the necessary prima facie proof of invidious discrimination - solely because he was poor, black and poorly educated - as to the place, method and quality of short-term care. (Woe AC, at 3-7, 9-14)



D. THE WOE AMENDED COMPLAINT CONTAINED PRIMA  
FACIE PROOF IN THE FORM OF DETAILED SPECIFIC  
ALLEGATIONS THAT THE CLASS CONSTITUTING OF  
INVOLUNTARILY CIVILLY COMMITTED STATE  
MENTAL INMATES WERE DISCRIMINATED AGAINST  
SOLELY BECAUSE THEY WERE SOCIALLY DISADVANTAGED.  
LEGION DID NOT.

The Legion AC contained only general allegations that custodial care in state mental institutions was inadequate throughout the nation. Furthermore, it contained only general allegations that this inadequate level of care was provided because the inmates were socially advantaged.

There was no claim that these conditions affected the involuntarily civilly committed inmates as a class. It was not even definitely alleged that Legion was involuntarily civilly committed. The class sought to be certified consisted of all the more than 1,000,000 inmates of all the state mental institutions for the mentally retarded and the mentally ill, inter alia, long-term retarded inmates such as Lillian Hosts, long-term elderly mentally ill inmates such as Richard Armies, long-term younger mentally ill inmates such as John Legion, etc.



By comparison, the Woe AC went into exhaustive detail in a total of 31 pages to present the necessary prima facie proof of invidious discrimination against Woe's class - involuntarily civilly committed inmates of state mental institutions for the mentally ill. Specific allegations with supporting citations were set forth to give the necessary prima facie proof that these inmates solely because they were socially disadvantaged had been discriminated against as to the place, method and quality of mental hospitalization. (Woe AC, at 23-54).

These 31 pages of prima facie proof included 10 pages of experts' opinions - including that of the federal defendants' own experts - that the socially disadvantaged suffered unjust discrimination as place, method and quality of mental hospitalization. [Woe AC 44-45] Furthermore, these experts concluded that the arbitrary Medicaid exclusion of the state facility actually exacerbated the pre-1965 de facto discrimination by the state and by private individuals against the socially disadvantaged mentally ill. See, Index to Appeal, Exhibits "D" through "T."

None of the prima facie proof contained in these 31 pages of the Woe Amended Complaint were contained in the brief Legion Amended Complaint.



The unanimous expert opinions that the Medicaid exclusion was invidious were stated by:

Every national medical organization including:

The American Medical Association  
The American Nursing Association  
The American Orthopsychiatric Association  
The American Psychiatric Association  
The American Public Health Association  
The National Association of State Mental Health Directors.

Every national black medical organization including:

The Association of Black Psychologists  
The Black Psychiatrists of America  
The National Medical Association

Every national black civil rights group including:

The Congress of Racial Equality  
The National Association for the Advancement of Colored People  
The National Black Feminist Organization  
The National Conference of Black Lawyers  
The National Urban League

Copies of their comments are set forth in Exhibits "D" through "T," see, Index to Appeal.



### CONCLUSION

The Order of the District Court should be reversed as follows:

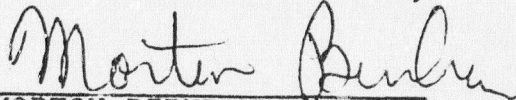
I. The plaintiffs should be granted leave to amend their Amended Complaint to join as individual and class defendants, those persons more fully described in pages 2 through 4 of the Motion of November 17, 1975, set forth in Appendix "E;" and, to join as individual defendants those persons more fully described in pages 3 and 4 of the Motion of December 8, 1975, set forth in Appendix "F;"

II. Class certification herein should be extended to all involuntarily civilly committed inmates of all state mental institutions for the mentally ill; and,

III. The claims that the New York Mental Hygiene Laws, the New York Legislature's appropriation bills for state supported short-term mental hospital care, and the Medicaid statute are unconstitutional as applied to involuntarily civilly committed state mental institution inmates should not be dismissed on Motions to Dismiss.

Dated: October 11, 1976  
Brooklyn, New York

Respectfully submitted,

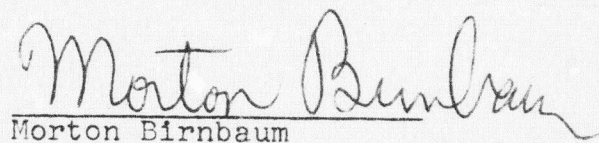
  
MORTON BIRNBAUM  
Attorney for Appellants



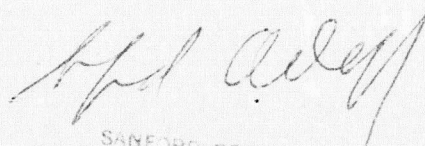
AFFIDAVIT OF SERVICE

STATE OF NEW YORK     )  
                              ) SS.:  
COUNTY OF KINGS     )

MORTON BIRNBAUM, being duly sworn, deposes and says that he is the counsel for the appellants herein; that on the 12th day of October, 1976, he served a copy of the annexed appellant's brief and the appendices thereto upon Louis J. Lefkowitz, Esq., counsel for the state defendants, and upon David G. Trager, Esq., counsel for the federal defendants, by depositing these papers post-paid in a United States mail box in envelopes addressed to said counsel.

  
Morton Birnbaum

Sworn to before me this  
12th day of October, 1976

  
SANFORD ORLOFF  
NOTARY PUBLIC, STATE OF NEW YORK  
No. 24-212376  
Qualified in Kings County  
Commission Expires March 30, 1977